Supreme Court, U.S.
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No. 90-1724

IN THE SUPREME COURT
OF THE UNITED STATES

CLYDE L. WEILER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent

Petition for Writ of
Certiorari to the Missouri Court
of Appeals, Western District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
Conclusion	12
Certificate of Service	13

TABLE OF AUTHORITIES

	Page
State v. Douglas, 797 S.W.2d 532 (Mo.App., W.D. 1990).....	4, 6
State v. Faulk, 725 S.W.2d 56 (Mo.App., E.D. 1987)	4
State v. Jones, 716 S.W.2d 799 (Mo. banc 1986)	3,4,5,7,8
State v. Weiler, 801 S.W.2d 417 (Mo.App., W.D. 1990).....	5,6,8

Statutes and Rules

Section 491.015, RSMo 1986	2,3,7,11
Section 491.015.1, RSMo 1986	3,5,7
Section 491.015.2, RSMo 1986	3

STATEMENT OF THE CASE

Petitioner, Clyde Weiler, was convicted of one count of sodomy, §566.060, RSMo 1986 and two counts of sexual abuse, §566.100, RSMo 1986, for which he was sentenced to a total of fifteen years imprisonment. Petitioner then filed a direct appeal. The facts relating to petitioner's offenses are summarized in the opinion of the Missouri Court of Appeals, Western District, affirming petitioner's conviction and sentence. **State v. Weiler**, 801 S.W.2d 417 (Mo.App., W.D. 1990).

ARGUMENT

Petitioner argues that

> "Missouri's Rape Shield Statute is facially unconstitutional as interpreted by the Missouri Supreme Court, or, alternatively, is unconstitutional as applied in this case."

(Petitioner's Pet. at 7).

The Missouri Rape Shield Statute, §491.015, RSMo 1986, states in relevant part:

> 1. In prosecutions under Chapter 566, RSMo, or prosecutions related to sexual conduct under Chapter 568, RSMo opinion and reputation evidence of the complaining witness's prior sexual conduct is inadmissible; evidence of specific instances of the complaining witness prior sexual conduct or in the absence of such instances or conduct is inadmissible, except where such specific instances are:
>
> 1) evidence of the sexual conduct of the complaining witness with the defendant to prove consent where consent is a defense to the alleged crime and the evidence is reasonably con-

temporaneous with the date of the alleged crime; or

2) evidence of specific instances of sexual activity showing alternative source or origin of semen, pregnancy or disease;

3) evidence of immediate surrounding circumstances of the alleged crime; or

4) evidence relating to the previous chastity of the complaining witness in cases, where, by statute, previously chaste character is required to be proved by the prosecution.

2. Evidence of the sexual conduct of the complaining witness offered under this section is admissible to the extent that the court finds the evidence relevant to a material fact or issue.

In **State v. Jones**, 716 S.W.2d 799, 800 (Mo. banc 1986), the Missouri Supreme Court held that in order for evidence to be admissible under §491.015, the evidence must 1) fit within one of the sub-sections of §491.015.1 and 2) such evidence is only admissible to the extent that the court finds the evidence relevant to a material fact or issue under §491.015.2. The court in Jones

then concluded that the defendant was not deprived of his right to a fair trial by the exclusion of the past sexual history of the victim. Id.

Subsequent cases have construed **Jones** to mean that Rape Shield statute may not be applied mechanistically to exclude evidence which a defendant is entitled to present. **State v. Douglas**, 797 S.W.2d 532, 535 (Mo.App., W.D. 1990). Thus, **Jones** does not rigidly rule out evidence of a victim's prior sexual history which does not fit into one of the categories expressly permitted by the Rape Shield Statute if the exclusion of such evidence would deprive a defendant of his constitutional right to a fair trial. **State v. Faulk**, 725 S.W.2d 56, 62 (Mo.App., E.D. 1987) (court concluded that defendant was not deprived of his right to a fair trial by the exclusion of the past sexual history of his victim); **State v. Douglas**, supra (defendant's right to a fair trial was violated

when the mechanistic application of §491.015 excluded evidence of victim's prior history when state argued that the victim's absence of an hymen was caused by intercourse with the defendant); **State v. Weiler**, supra (exclusion of prior sexual history of the victim under the Rape Shield Statute did not deprive appellant of his right to a fair trial).

Thus, despite the protestation in petitioner's brief to the contrary, there is no split in the Missouri lower courts or the interpretation of **Jones** and the application of the Rape Shield Statute. The law is clear in Missouri that if such evidence clearly fits within one of the exceptions under §491.015 and is also relevant, it is clearly admissible at trial. **Jones**, supra. Just as clearly, even if evidence does not fit within an exception under §491.015.1, but is relevant, such evidence can be admissible if the exclusion of such evidence would result in the deprivation of appellant's right to a fair

trial. **Douglas**, supra; **Weiler**, supra.[1]

Respondent further notes that the failure of petitioner's brief to address the Western District Court's opinion. In the case at bar, petitioner claims that the trial court erred in unduly restricting proof of the child victim's sexual activities and propensities. Specifically, petitioner wished to present evidence that the seven-year-old child victim was a frequent masturbater; that she often masturbated before her friend Tina who was a witness for the state; and that she indicated to Tina that being around little boys made

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[1]Respondent notes that in both **Weiler** and **Douglas**, applications for transfer to the Missouri Supreme Court were denied by the Missouri Supreme Court.

her "horny". This proof was excluded by the trial court on the grounds of the Rape Shield Statute. Section 491.015, RSMo 1986.

Clearly such evidence does not fall within any of the sub-sections of §491.015.1. Thus, the evidence only could have been admitted if its exclusion would have violated petitioner's right to a fair trial. Jones, Douglas, supra.

The Missouri Court of Appeals, Western District, stated in its opinion that:

> In the case before us, however, we believe the exclusion of the evidence of E.B.'s [the child victim] sexual practices was not prejudicial to defendant and did not deprive him of a fair trial. From the state's own evidence the jury could infer that E.B. was sexually aware, and the evidence defendant was not permitted to introduce would have added very little. Notice the following evidence which was before the jury without objections from the state's own witnesses: E.B. testified that she,

> in return for candy, money and toys, had been touching defendant's sexual organs (including fellatio) at his instigation since she was seven. E.B. had been the victim of "bad touching" by her father when she was "two or three" and was attending sessions at Metropolitan organization to counter sexual assault ("MOCSA"). Defendant transported her to and from the MOCSA meetings. Furthermore, E.B.'s familiarity with the male anatomy and the technique is clear from Tina's description of the act.
>
> The evidence which was excluded would have no tendency to impeach E.B.'s credibility. E.B.'s consent to the acts which defendant was charged was no defense and her consent was not at issue in the case. We have concluded that the exclusion under the rape shield statute of the evidence of E.B.'s sexual practices and proclivities was entirely correct.

State v. Weiler, supra at 419.

Petitioner has made no attempt in his petition to show that the exclusion of this

evidence deprived him in any way of his right to a fair trial. Rather, petitioner relies on a misinterpretation of **Jones**, supra, an interpretation that is not followed in the State of Missouri by the lower courts, to create his strawman argument. As it is written and applied in Missouri, the Rape Shield Statute is neither facially unconstitutional nor unconstitutionally applied to this case.[2]

Petitioner also argues in his petition that the excluded evidence would have cast doubt on E.B.'s testimony by dispelling any assumption that she lacked sufficient knowledge to

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[2]Assuming arguendo that petitioner's interpretation of **Jones** is correct, it would have no bearing on this case. It is clear that the Missouri Court of Appeals, Western District, did not apply the overly mechanistic interpretation that petitioner reads as being required by **Jones**.

fabricate her evidence and would have bolstered the petitioner's credibility and enhanced the possibility that the jury would acquit him. Petitioner reasons that the jury would assume that a ten-year-old child like the victim was a sexual innocent and they would reject defendant's testimony; but if they had known of her sexual sophistication, they would have found defendant's account more believable.

Since E.B. was only ten, her consent was not an issue. Thus, respondent cannot fathom how E.B.'s sexual sophistication was relevant in this trial. Either the events in question happened or they did not and the jury, by convicting petitioner, rendered its verdict. Respondent submits that there is no reason for this Court to reweigh that valid jury determination.

The remainder of petitioner's petition contains variations of his basic theme that this evidence would have helped petitioner at trial and therefore it should have been

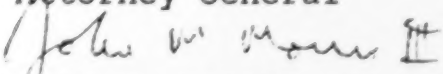
admitted. There is no argument by petitioner, however, that the exclusion of this evidence deprived petitioner of his right to a fair trial. Moreover, the Western District Court of Appeals for Missouri found that no such deprivation occurred. Thus, the evidence of the child victim's sexual proclivities was not admissible under §491.015, RSMo 1986 and that the exclusion of such evidence was proper. Therefore, respondent submits that the record presents no basis upon which this Court could find that the Missouri Court of Appeals, Western District, acted erroneously and no basis upon which review of this case by this Court is warranted.

Conclusion

In view of the foregoing, respondent submits that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that a true and correct copy of the Brief of Respondent in Opposition to Petition in the case of **State of Missouri v. Clyde Weiler**, was mailed, pursuant to Supreme Court Rule 28.5(b), postage prepaid, this 25th day of July, 1991, to:

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